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Before The
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Investigation of Tariffs Filed by
ACS Of Anchorage, Inc.,
and the National Exchange Carrier
Association

December 17, 2001
Mag Access Charge Tariff Filings

CC Docket No. 02-36

CCB/CPD No. 01-23

DIRECT CASE OF ACS OF ANCHORAGE, INC.

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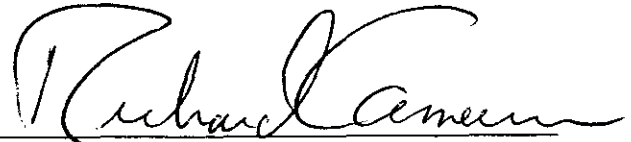
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V. CONCLUSION

For the following reasons, ACS believes that its January 2002 Tariff complies in all material respects with the *Rate-of-Return Access Charge Reform Order*, the *Jurisdictional Separations Freeze Order*, the *GCI Order*, and the *MAG Tariff Filing Order*. As such, ACS hereby urges the Commission to terminate this investigation without ordering ACS to reduce any of the interstate access rates contained in that tariff or to issue refunds of any amounts collected pursuant to that tariff. If the Commission decides otherwise, then ACS nevertheless requests that the Commission stay the effectiveness of this finding until the D.C. Circuit resolves ACS's Petition for Review of the *GCI Order*.

Respectfully submitted,

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	BACKGROUND	2
A.	ACS's July 2000 Tariff	2
B.	The <i>GCI Order</i>	3
C.	The <i>Rate-of-Return Access Charge Reform Order</i> and <i>MAG Tariff Filing Order</i>	5
D.	The January 2002 Tariff	6
E.	GCI And AT&T Complaints And The Commission's Investigation	6
III.	ACS'S DIRECT CASE ON ISSUES DESIGNATED FOR INVESTIGATION	7
A.	ACS's Baseline Revenue Requirement	7
1.	The Commission's <i>Rate-of-Return Access Charge Reform Order</i> and <i>MAG Tariff Filing Order</i> Instructed ACS To Use The Revenue Requirement From Its July 2000 Annual Access Tariff In the December 2001 Tariff	8
2.	ACS Has Never Allocated UNE Revenues Differently from UNE Costs	12
3.	Information Requested in Paragraph 11	13
B.	ACS's Reallocation Of Line-Port Costs	14
1.	ACS Correctly Calculated Its Line-Port Costs	14
2.	Information Required by Paragraph 16	16
C.	ACS's Reallocation Of Its TIC Revenue Requirement	16
1.	ACS Correctly Reallocated Its TIC Revenue Requirement	17
2.	Information Required by Paragraph 19	17
D.	The Reasonableness Of ACS's Revised Access Rates	18
1.	ACS's Revised Access Rates Were Reasonable	18
2.	Retrospective and Prospective Adjustments	19
3.	Information Requested in Paragraph 23	20
IV.	ACS Contingent Request for a Stay	21
V.	CONCLUSION	23

to change its rates and possibly refund amounts it could never recover prior to receiving guidance from the D.C. Circuit that is so close at hand.

A stay to preserve the status quo ante would also prevent ACS from suffering irreparable harm, while protecting the interests of all parties. The January 2002 Tariff is already subject to an accounting order in this case, *Suspension Order* at para. 12. If the Commission ultimately determines that ACS should issue refunds to its interstate access customers in this case, there is no reason why ACS could not continue to keep account of the amounts potentially due to its access customers until the D.C. Circuit acts.

Such a stay would also be consistent with the Commission's prior actions in the enforcement action that produced the *GCI Order*. The Commission has already issued a similar stay of the effectiveness of the portion of the *GCI Order* requiring ACS to pay damages to GCI, pending the outcome of this litigation, so long as ACS placed an amount equal to the damages award in escrow. In protecting the status quo ante, the Commission found that such a stay would best protect the interests of all parties, particularly GCI, while the case moved forward.⁵⁸ In this case, similarly, if ACS is ordered to reduce its rates or issue a refund, that revenue will be lost to it forever. In contrast, it will always be possible for ACS to issue a refund that will make its access charge customers whole, should the Commission prevail before the D.C. Circuit.

⁵⁸ *GCI Stay Order*, at ¶¶ 3-4.

I. INTRODUCTION AND SUMMARY

By order released February 15, 2002 (the “*Designation Order*”), the Commission designated for investigation certain issues regarding, *inter alia*, the rates in the access charge tariff filed by ACS of Anchorage, Inc. (“ACS”) in December 2001 to become effective January 1, 2002.¹ Specifically, the *Designation Order* set for investigation whether ACS correctly implemented the Commission’s *Rate-of-Return Access Charge Reform Order*² by (i) using the appropriate baseline revenue requirement determining the rates in the January 2002 Tariff; (ii) correctly determining the line-port costs to be reallocated to the common line category; (iii) correctly reallocating the transport interconnection charge (“TIC”) among the access categories; and (iv) developing access charge rates that reflect the appropriate baseline revenue requirement and reallocations thereto.

ACS firmly believes that the answer to all of these questions is “yes,” and that its January 2002 Tariff complies in all material respects with the *Rate-of-Return Access Charge Reform Order*, the *Jurisdictional Separations Freeze Order*,³ the *GCI Order*,⁴ and the *MAG*

¹ *Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association*, CC Docket No. 02-36, Order Designating Issues for Investigation, 17 FCC Rcd 2475 (Com. Car. Bur., Comp. Pric. Div. 2002); ACS of Anchorage, Inc., Tariff FCC No. 1, Transmittal No. 6 (filed Dec. 17, 2001) (“January 2002 Tariff”).

² *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19,613 (2001) (“*Rate-of-Return Access Charge Reform Order*”).

³ *Jurisdictional Separations and Referrral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382 (2001) (“*Jurisdictional Separations Freeze Order*”).

⁴ *See General Communication, Inc. v. Alaska Communications Systems Holdings*, 16 FCC Rcd 2834 (2001) (“*GCI Order*”).

“We also direct ACS, as part of its direct case, to submit the revised tariff rates for all access charge elements that would result if we require it to file based on the recalculated revenue requirements described in Issues A-C, above. ACS shall include both the revenue requirement and demand components for each rate element and shall submit the work papers supporting the revised rate development, including any assumptions used in deriving the revised rates.”

ACS provides revised tariff rates for all access charge elements that would result if the Commission were to require it to recalculate its revenue requirements described in Issues A-C, above, and in violation of the *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order*, at ATTACHMENT H.

IV. ACS CONTINGENT REQUEST FOR A STAY

ACS firmly believes that its January 2002 Tariff complies in all material respects with all applicable Commission rules and orders. If the Commission decides to the contrary, however, that ACS should have restated the demand data contained in the cost study supporting its July 2000 Tariff to separate the traffic-sensitive costs of ISP-bound traffic in the intrastate jurisdiction, then ACS nevertheless requests that the Commission stay the effectiveness of this finding until the D.C. Circuit resolves ACS’s Petition for Review of the *GCI Order*. The issue whether ACS properly separated the traffic-sensitive costs of ISP-bound traffic to the interstate jurisdiction is squarely presented in that proceeding, which has been fully briefed and in which oral argument was heard on March 4, 2002. A decision is expected within a matter of weeks or months. While ACS understands that the Commission must act within the five-month statutory deadline created by Section 204(a)(2)(A) of the Act,⁵⁷ it also would be precipitous to force ACS

⁵⁷ 47 U.S.C. § 204(a)(2)(A).

Tariff Filing Order.⁵ ACS hereby submits its direct case in response to the *Designation Order*. If the Commission decides to the contrary, however, that ACS should have restated the demand data contained in the cost study supporting its July 2000 Tariff to separate the traffic-sensitive costs of ISP-bound traffic in the intrastate jurisdiction, then ACS nevertheless requests that the Commission stay the effectiveness of this finding, pending resolution by the D.C. Circuit of ACS's Petition for Review of the *GCI Order*. The Court has already heard oral argument in that case, which squarely presents the issue whether ACS's jurisdictional treatment of ISP-bound traffic is proper, and a decision is expected within a matter of weeks or months. Further, unlike purchasers of interstate access services, to which the Commission could order ACS to issue a refund of any amount improperly billed, ACS would be irreparably harmed by any Commission order to reduce its interstate access rates that is based on a jurisdictional theory that the D.C. Circuit may not ultimately accept.⁶

II. BACKGROUND

A. ACS's July 2000 Tariff

ACS is the incumbent local exchange carrier ("LEC") serving Anchorage, Alaska and its environs. ACS participates in the interstate common line access tariff filed by the National Exchange Carrier Association ("NECA"), but files its own interstate traffic-sensitive switched access and special access tariffs. In June 2000, ACS's predecessor, Anchorage Telephone Utility ("ATU"), filed its biennial access tariff, which took effect July 1, 2000 (the

⁵ *December 17, 2001 MAG Access Charge Tariff Filings*, 16 FCC Rcd 20960 (Comp. Pricing Div. 2001) ("*MAG Tariff Filing Order*").

⁶ Such a stay would be consistent with the Commission's decision to stay the effectiveness of the portion of the *GCI Order* requiring ACS to pay damages to GCI, pending the outcome of this litigation, so long as ACS placed an amount equal to the damages award in escrow. In doing so, the Commission found that such a stay would protect the interests of all parties. *General Communication, Inc. v. Alaska Communications Systems Holdings, Inc.*, 16 FCC Rcd. 8169 (2001), at ¶¶ 3-4 ("*GCI Stay Order*").

Order. Further, as the Commission repeatedly recognized in the *Designation Order*, if the Commission finds that ACS properly based its January 2002 tariff on the demand data contained in the cost study supporting its July 2000 Tariff, then ACS's remaining calculations are correct, and ACS established appropriate rates.⁵⁴ In such a case, it would be arbitrary and capricious for the Commission to order ACS to issue a refund.

Even if the Commission finds that ACS should have computed its rates in the January 2002 Tariff on some other basis, it still should not order ACS to refund amounts collected under the January 2002 Tariff. The Commission has discretion whether or not to order refunds in any given tariff investigation.⁵⁵ Given that ACS complied scrupulously with the directives of the *Rate-of-Return Access Charge Reform Order* and the *MAG Tariff Filing Order*, it would be arbitrary and capricious to order ACS to issue a refund simply because the Commission now determines that its clear directives had unintended consequences. ACS was entitled to act based on the plain meaning of those orders, and cannot be punished because the Commission failed to speak precisely.⁵⁶

3. Information Requested in Paragraph 23

ACS hereby submits as exhibits to its Direct Case, the following information requested by the Commission in the *Designation Order*:

⁵⁴ *Designation Order*, at ¶¶ 15, 18, 22.

⁵⁵ *AT&T v. FCC*, 487 F.2d 865, 880 (2nd Cir. 1973); *800 Data Base Access Tariffs and the 800 Service Management System Tariff*, Order on Reconsideration, 12 FCC Rcd 5188, 5193 (1997).

⁵⁶ *See Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) ("The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'"); *see also McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) ("[I]t is well settled that regulations cannot be construed to mean what an agency intended but did not adequately express." (citation omitted)).

“July 2000 Tariff”). In the July 2000 Tariff, ATU allocated the traffic-sensitive costs attributable to identifiable ISP traffic to the interstate jurisdiction for separations purposes,⁷ consistent with what ACS believes are the unambiguous requirements of section 36.125 of the Commission’s rules⁸ and with the Commission’s longstanding and consistent characterization of Internet service provider (“ISP”) traffic as largely interstate.⁹ In October 2000, ACS assumed the rates and terms of the July 2000 Tariff.¹⁰

B. The GCI Order

On August 24, 2000, General Communication, Inc. (“GCI”), an ACS interstate access customer and a local exchange and interexchange competitor of ACS, filed a complaint with the Commission, alleging that ACS exceeded its rate of return for switched traffic-sensitive service for the 1997–1998 monitoring period.¹¹ Although ACS filed its January 1998 and July 1998 tariffs under the streamlined-filing provisions of section 204(a)(3) of the Communications Act, as amended (the “Act”) and the tariffs were thus deemed lawful,¹² CGI sought retrospective damages for alleged overearnings caused by ACS’s treatment of each minute of intraoffice calls as a single dial equipment minute of use (“DEM”) and allocation of the traffic-sensitive costs of switching ISP-bound calls to ACS’s interstate rate base for the period covered by those tariffs.

⁷ See ATU Tariff Transmittal No. 108, D&J, at 14 (June 16, 2000) (“This filing reflects all identifiable Internet service provider (ISP) traffic as interstate.”).

⁸ 47 C.F.R. § 36.125.

⁹ E.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, 14 FCC Rcd 3689 (1999), at ¶12; *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15,982 (1997), at ¶ 341 & n.498.

¹⁰ See ACS Transmittal No. 1, dated Sept. 26, 2000, effective Oct. 11, 2000.

¹¹ See *GCI Order*, at ¶ 1.

¹² 47 U.S.C. § 204(a)(3).

December 2001 Tariff, the rates contained in its January 2002 Tariff were reasonable. As the Commission itself recognized in the *Order*, “if the Commission concludes that ACS correctly used the revenue requirement underlying its 2000 annual tariff to establish revised rates, it appears the ACS’s December 17 tariff filing established appropriate rates.”⁴⁹

2. Retrospective and Prospective Adjustments

If the Commission finds that ACS should not have complied with the requirements of the *Rate-of-Return Access Charge Reform Order* and the *MAG Tariff Filing Order* in this case, and should not have used “the demand data used in the last annual tariff filing made by the carrier,”⁵⁰ it may prescribe new rates for ACS to use, but it may do so only prospectively. The Commission may only prescribe a carrier’s rate based on a finding that the existing charge contained in the tariff “is or will be in violation of any of the provisions of this Act.”⁵¹ In such a case, the Commission may prescribe a “just and reasonable charge,” meaning that the Commission must, of necessity, find that the previously tariffed charge is unjust and unreasonable.⁵²

In the context of an incumbent local exchange carrier, such a finding generally must be premised on a finding that the rate is not calculated in accordance with the interstate access rate development rules prescribed in Parts 32, 64, 36, and 69 of the Commission’s rules.⁵³ In this case, as discussed above, ACS prepared its January 2002 Tariff in compliance with the requirements of the *Rate-of-Return Access Charge Reform Order* and the *MAG Tariff Filing*

⁴⁹ *Id.* ¶ 22.

⁵⁰ *MAG Tariff Filing Order*, at ¶ 3.

⁵¹ 47 U.S.C. § 205(a).

⁵² *Id.*.

⁵³ *Id.* Parts 32, 64, 36, 69.

The Commission ruled for GCI, finding, *inter alia*, that (i) ACS should have assigned the traffic sensitive costs of Internet-bound traffic to the *intrastate*, and not the *interstate*, jurisdiction and (ii) counted each minute of an intraoffice call as two DEMs rather than one.¹³ The Commission concluded that ACS's January 1998 and July 1998 tariffs were not deemed lawful under section 204(a)(3) and awarded GCI \$2,765,371 in retrospective damages.¹⁴ The Commission ordered ACS, "until further ordered otherwise by the Commission, . . . [to] (i) assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic, and (ii) count DEMs for intraoffice calls in the manner specified herein,"¹⁵ and directed ACS to revise its 1997–1998 Monitoring Report consistent with the *GCI Order*. The Commission, however, did *not* order ACS to revise its July 2000 Tariff, then in effect.¹⁶ Pursuant to section 69.3 of the Commission's rules, ACS's next access tariff filing would have been for the two-year period beginning July 1, 2002.¹⁷ ACS's appeal of the *GCI Order* is currently pending in the United States Court of Appeals for the District of Columbia Circuit, and the Commission has stayed the effectiveness of its Order to the extent that it required ACS to pay damages to GCI, pending the outcome of this appeal.¹⁸

¹³ *GCI Order*, at ¶¶ 16–50.

¹⁴ *See id.* ¶¶ 51–64, 77.

¹⁵ *Id.* ¶ 79.

¹⁶ *See id.* ¶ 78.

¹⁷ *See* 47 C.F.R. § 69.3.

¹⁸ *See ACS of Anchorage, Inc. v. FCC*, No. 01-1059, Petition for Review of an Order of the Federal Communications Commission (D.C. Cir. filed Feb. 7, 2001) (oral argument heard Mar. 4, 2002); *See GCI Stay Order*, at ¶¶ 3–4

- B. “We also direct ACS, as part of its direct case, to submit revised TIC reallocations to other access categories consistent with the revised revenue requirements calculated in response to Issue A, above. ACS shall submit all work papers associated with the calculation of the reallocation of its TIC revenue requirement among the access charge categories.”**

ACS has provided revised TIC reallocations to other access categories consistent with the revised revenue requirements calculated in response to issue A in ATTACHMENT G.

D. The Reasonableness Of ACS’s Revised Access Rates

The *Designation Order* set for investigation the reasonableness of the interstate access rates that ACS charged in its December 2001 Tariff.⁴⁶ The *Designation Order* also directed ACS to submit “the revised tariff rates for all access charge elements that would result if we require it to file based on the recalculated revenue requirements” provided above.⁴⁷ The Commission also asked the parties to “comment on which rates may appropriately be adjusted effective January 1, 2002, under the provisions of section 204, and which may only be modified prospectively.”⁴⁸

1. ACS’s Revised Access Rates Were Reasonable

For the same reasons as are discussed above in the context of the first issue designated for investigation, the *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order* did not permit ACS to develop the rates in its January 2002 Tariff using any cost study other than the one supporting its July 2000 Tariff, and no other superseding Commission directive required otherwise. Because, under the *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order*, ACS appropriately used its July 2000 Tariff cost data in its

⁴⁶ *Id.* ¶ 22.

⁴⁷ *Id.* ¶ 23.

⁴⁸ *Id.*

C. The *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order*

On November 8, 2001, the Commission released the *Rate-of-Return Access Charge Reform Order*, which, among other things, revised several access charge rules applicable to rate-of-return carriers. The *Rate-of-Return Access Charge Reform Order*, as pertinent to this investigation, required the reallocation of line-port costs from local switching to the common line category. In lieu of conducting a cost study, carriers may shift 30 percent of the local switching costs to the common line category as a proxy of for their actual line-port costs. Moreover, the *Rate-of-Return Access Charge Reform Order* required the reallocation of costs recovered through the transport interconnection charge (“TIC”) among all access categories, subject to a specific dollar limit equal to the TIC revenues for the twelve months ending June 30, 2001. Because these cost reallocations required reassignment of certain costs from specified interstate access categories to the common-line category, the *Rate-of-Return Access Charge Reform Order* required rate-of-return carriers who file their own traffic-sensitive interstate access charge tariffs to revise their existing interstate tariffs to implement the changes. In the *Rate-of-Return Access Charge Reform Order*, however, the Commission indicated that this process should be revenue-neutral, holding that “the rate structure modifications we adopt do not affect overall recovery of interstate access costs.”¹⁹

In the *MAG Tariff Filing Order*, released on November 26, 2001, the Commission set forth the procedures for the filing of revised access charge tariffs by rate-of-return carriers pursuant to the *Rate-of-Return Access Charge Reform Order*.²⁰ The *MAG Tariff Filing Order*, among other things, established a December 17, 2001 filing deadline as well as other procedures

¹⁹ *Rate-of-Return Access Charge Reform Order*, ¶ 12.

²⁰ *MAG Tariff Filing Order*, at ¶ 1.

1. ACS Correctly Reallocated Its TIC Revenue Requirement

For the same reasons as are discussed above in the context of the first issue designated for investigation, the *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order* did not permit ACS to reallocate its TIC using any cost study other than the one supporting its July 2000 Tariff, and no other superseding Commission directive required otherwise. Because, under the *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order*, ACS appropriately used its July 2000 Tariff cost data in its December 2001 Tariff, it correctly reallocated its TIC revenue requirement. As the Commission itself recognized in the *Order*, “if the Commission concludes that ACS was correct in using its 2000 revenue requirement, ACS’s December 17 tariff would appear to be correct.”⁴⁵

2. Information Required by Paragraph 19

ACS hereby submits as exhibits to its Direct Case, the following information requested by the Commission in the *Designation Order*:

- A. “ We further direct ACS to submit, as part of its direct case, a recalculated TIC revenue requirement derived from that revised interstate transport revenue requirement ACS shall also recalculate what the TIC revenues would have been for the twelve-month period ending June 30, 2001, if it had determined its interstate transport revenue requirement and established TIC rates based on that revenue requirement.**

ACS has provided the recalculated TIC revenue requirement derived from the revised interstate transport revenue requirement in ATTACHMENT D at Page 3 of 8.

⁴⁵ *Designation Order*, at ¶ 18.

for the submission of revised tariffs. Importantly, the *MAG Tariff Filing Order* required that “all calculations . . . be based on the demand data used in the last annual tariff filing made by the carrier.”²¹

D. The January 2002 Tariff

Pursuant to the Commission’s *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order*, ACS filed a revised interstate access charge tariff on December 17, 2001. In accordance with these orders, ACS used the prospective demand data contained in its July 2000 Tariff—the last annual tariff filing made by ACS—in performing the cost reassignments and cost reallocations required by the *Rate-of-Return Access Charge Reform Order* in the December 2001 Tariff. Accordingly, the rates in the January 2002 Tariff, like the rates in ACS’s July 2000 Tariff, are based on the allocation of costs attributable to ISP traffic to the interstate jurisdiction.

E. GCI And AT&T Complaints And The Commission’s Investigation

GCI and AT&T Corp. (“AT&T”) filed separate petitions to the Commission to suspend and investigate ACS’s January 2002 Tariff.²² On December 31, 2001, the Commission suspended for one day all tariffs filed pursuant to the *Rate-of-Return Access Charge Reform Order* and initiated an investigation into the lawfulness of the rates contained in those filings.²³ The Commission, on January 30, 2002, *sua sponte* reconsidered the suspension and investigation

²¹ *Id.* ¶ 3.

²² ACS of Anchorage, Inc., Tariff FCC No. 1, Transmittal No. 6, Petition of GCI to Suspend and Investigate (filed Dec. 21, 2001) (“GCI Petition”); *December 17, 2001 MAG Access Charge Tariff Filings*, Petition of AT&T Corp. (filed Dec. 26, 2001) (“AT&T Petition”).

²³ *December 17, 2001 MAG Access Charge Tariff Filings*, CCB/CPD File No. 01-23, Order, DA 01-3023, 17 FCC Rcd 116 (Comp. Pricing Div., rel. Dec. 31, 2001) (“*Suspension Order*”), *Erratum*, DA 01-3032 (Comp. Pricing Div., rel. Dec. 31, 2001).

switching revenue requirement for tariff year 2001). ACS therefore believes that this mismatch, cost ACS over \$1 million in its aggregate interstate revenue requirement, which the Commission should restore.

2. Information Required by Paragraph 16

ACS hereby submits as exhibits to its Direct Case, the following information requested by the Commission in the *Designation Order*:

- A. “First, [ACS] shall indicate the line-port costs it reported to NECA to be used in NECA’s tariff development for its December 17 common line tariff filing. Second, ACS shall submit the line-port costs to be reallocated to the common line category based on the recalculated interstate local switching revenue requirement submitted in response to Issue A, above, using the 30 percent factor it opted to use in its December 17 tariff filing.”**

ACS has provided line-port costs reported to NECA and line-port costs to be reallocated to the common line category based on the recalculated interstate local switching revenue requirement as ATTACHMENT F.

- B. “ACS shall submit all work papers associated with the calculation of the line-port costs to be reassigned to the common line category.”**

Work papers associated with the calculation of the line-port costs to be reassigned to the common line category are provided as ATTACHMENT G.

C. ACS’s Reallocation Of Its TIC Revenue Requirement

The *Designation Order* set for investigation the issue whether, having used its July 2000 Tariff’s revenue requirement, ACS correctly reallocated its TIC revenue requirement. The Order also directed ACS to submit a recalculated TIC revenue requirement derived from the interstate transport revenue requirement, as recalculated to exclude ISP switching costs and count intraoffice calls as two DEMs.

of the tariffs of all carriers other than ACS's December 2001 Tariff and NECA's common-line tariff.²⁴

III. ACS'S DIRECT CASE ON ISSUES DESIGNATED FOR INVESTIGATION

A. ACS's Baseline Revenue Requirement

The Commission's *Designation Order* first designated for investigation the issue "whether it was appropriate for ACS to use the revenue requirement underlying its 2000 annual access charge tariff filing, which counted ISP minutes of use as interstate, to determine the amount of line-port and TIC costs to be allocated to the common line category and to establish revised access charges."²⁵ The *Designation Order* in this regard directed ACS to submit a recalculated interstate revenue requirement for the year ending June 30, 2001 that classifies ISP minutes of use as intrastate minutes and counts two DEMs for each intraoffice call.²⁶ The *Designation Order*, moreover, directed ACS to "indicate how it allocates revenues from the provision of UNEs."²⁷

ACS does not dispute that, as directed by the Commission, its January 2002 Tariff is based on the cost study supporting its July 2000 Tariff, which treats the traffic sensitive costs of ISP-bound traffic as interstate. In this case, the Commission took the extraordinary step of requiring a tariff filing, not based on cost studies that comply with current rules, but based on cost-studies performed under the Commission's rules as they existed in June, 2000. Having directed carriers to do so, it is passing strange now to suspend and investigate the resulting tariff

²⁴ *December 17, 2001, MAG Access Charge Tariff Filings*, CCB/CPD No. 01-23, Order on Reconsideration, DA 02-234, 17 FCC Rcd 1786 (Comp. Pricing Div., rel. Jan. 30, 2002).

²⁵ *Designation Order*, at ¶ 10.

²⁶ *See id.* ¶ 11.

²⁷ *Id.* ¶ 12.

included ISP traffic in the count of interstate minutes for purposes of determining the interstate local switching revenue requirement, it appears that ACS would have correctly calculated the amount of line-port costs to be reallocated to the common line category in its December 17 tariff filing.⁴⁴

ACS elected to proceed under the “30 percent” proxy the Commission established in the *Rate-of-Return Access Charge Reform Order* rather than to perform its own cost study to separate the costs of the line-side ports from the remaining local switching costs. Accordingly, ACS deducted \$2,584,432 (equal to 30 percent of its tariff year 2000 local switching revenue requirement of \$8,614,663) from its local switching revenue requirement to be recovered through local switching charges in the January 2002 Tariff.

As part of this tariff investigation, ACS will request that the Commission order NECA to increase its interstate common line revenue requirement by \$1,083,238, or the exact amount (to be determined in this proceeding) by which ACS’s aggregate interstate revenue requirement decreased as a result of the rate restructuring in the ACS and NECA tariffs at issue in this investigation. In apparent violation of the Commission’s revenue neutrality goal, this decrease was caused by ACS’s use of demand data from its cost study supporting its July 2000 Tariff and NECA’s use of demand data contained in a cost study ACS submitted to NECA in March, 2001, containing projected demand data for tariff year 2001. In compliance with the *GCI Order*, the cost studies that ACS submitted to NECA in March, 2001, for use in preparing NECA’s common line pool tariff filed to take effect on July 1, 2001 treated the traffic-sensitive costs of ISP-bound traffic as *intrastate*. Therefore, in the NECA common line pool tariff at issue in this investigation, ACS believes that NECA increased ACS’s common line revenue requirement only \$1,501,194 (equal to 30 percent of the resulting, smaller interstate local

⁴⁴ *Id.*

based on “substantial questions of lawfulness” under the rules as they existed in December, 2001.²⁸

1. The Commission’s *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order* Instructed ACS To Use The Revenue Requirement From Its July 2000 Annual Access Tariff In the December 2001 Tariff

ACS properly based its January 2002 Tariff on the July 2000 to June 2001 prospective cost study ACS prepared to support its July 2000 Tariff.²⁹ In the, the Commission directed carriers to ensure that, insofar as is practical, their January 2002 Tariff filings were revenue neutral.³⁰ The *MAG Tariff Filing Order* explicitly instructed carriers to perform “calculations . . . based on the demand data used in the last annual tariff filing made by the carrier.”³¹ In ACS’s case, the July 2000 Tariff was the “the last annual filing made by the carrier,” and ACS accordingly followed the Commission’s instructions in using the cost study data from that filing.

Accordingly, the *only* appropriate cost study for ACS to use in developing its January 2002 Tariff was the one supporting its July 2000 Tariff. To engage in wholesale recalculation of its interstate costs in this tariff filing, ACS would either have needed to:

(1) completely restate the cost study supporting its July 2000 Tariff, creating a new, retrospective

²⁸ *Suspension Order*, at ¶¶ 6, 7.

²⁹ This cost study separated the traffic sensitive costs of ISP-bound traffic to the interstate jurisdiction, and counted intraoffice calls as two DEMs. ACS continues to believe that its treatment of the traffic sensitive costs of ISP-bound traffic complies with the Commission’s jurisdictional separations rules, 47 C.F.R. § 36.125, and this issue is currently pending before the D.C. Circuit in ACS’s appeal of the *GCI Order*.

³⁰ *Rate-of-Return Access Charge Reform Order*, at ¶ 12 (holding that “the rate structure modifications we adopt do not affect overall recovery of interstate access costs”).

³¹ *Id.*

- E. “In addition, ACS shall, as part of its direct case, indicate how it allocates revenues from the provision of UNEs. If these revenues are allocated differently than the associated costs, ACS shall explain why the allocation process is different. If the allocation procedures are different, ACS shall also submit data reflecting the allocation of UNE revenues on a comparable basis to the allocation of the associated costs.”**

Information on ACS’s treatment of UNE costs and revenues is provided above.

B. ACS’s Reallocation Of Line-Port Costs

The *Designation Order* set for investigation the issue “whether ACS correctly calculated the amount of line-port costs to be reallocated to the common line category.”⁴³ The *Designation Order* also directs ACS to report the line-port costs it reported to NECA for NECA’s December 17 common line tariff filing, and to submit recalculated line-port costs based on the recalculation of its interstate local switching revenue requirement for tariff year 2000 that classifies ISP minutes of use as intrastate minutes and counts two DEMs for each intraoffice call.

1. ACS Correctly Calculated Its Line-Port Costs

For the same reasons as are discussed above in the context of the first issue designated for investigation, the *Rate-of-Return Access Charge Reform Order* and *MAG Tariff Filing Order* did not permit ACS to compute its line port costs using any cost study other than the one supporting its July 2000 Tariff, and no other superseding Commission directive required otherwise. ACS therefore properly used data from the cost study supporting its July 2000 Tariff in its January 2002 Tariff and, therefore, it correctly calculated the amount of line-port costs to be reallocated to the common-line category. As the Commission itself recognized in the *Order*,

[i]f . . . it was appropriate for ACS to use the local switching revenue requirement from its 2000 annual tariff filing, which

⁴³ *Designation Order*, at ¶ 15.

“projection” of its tariff year 2000 costs and demand;³² or (2) develop a new cost study projecting costs and demand for the period July 1, 2001 to June 30, 2002, as it would have done to file an annual access tariff to take effect on July 1, 2001. Neither of these cost studies would ever have been used to support any ACS tariff filing, much less the most recent and, therefore, ACS would have violated the Commission’s directive had it used either one.

The prior *GCI Order* and *Jurisdictional Separations Freeze Order* cannot override that more recent Commission directive. The *GCI Order* required ACS to do only three things, all of which ACS has done: (1) to pay damages to GCI,³³ (2) to revise and refile its 1997–1998 Monitoring Report; and (3) to “(i) assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic, and (ii) count DEMs for intraoffice calls in the manner specified herein” – *i.e.*, as two DEM.³⁴ It did *not* require ACS to modify the July 2000 Tariff on which the January 2002 Tariff was based. While GCI makes much of language in the *GCI Order* that would require ACS to assign the costs of carrying ISP-bound traffic to the intrastate jurisdiction beginning January 1, 1999,³⁵ this language does not appear in the Ordering Clauses, but in a summary of the decision. Further, this language appears to refer only to ACS’s computation of earnings in its monitoring reports, as it would have been, even in January, 2001, impossible for ACS to have retroactively altered its 1999 and 2000 tariffed rates based on this directive. Indeed, neither the Commission nor any private party informed ACS of any contrary interpretation of the *GCI Order* in the nearly one year that elapsed between the *GCI*

³² The Commission’s *Designation Order* essentially requires ACS to follow such a process to prepare this Direct Case.

³³ These damages are currently being held in escrow pending the outcome of ACS’s appeal of the *GCI Order*.

³⁴ *GCI Order*, at ¶¶ 77-79.

³⁵ *Id.* ¶ 2.

all UNE loop costs and revenues to the intrastate jurisdiction. This treatment is also reflected in cost studies ACS submitted to the RCA in July 2001.

3. Information Requested in Paragraph 11

ACS hereby submits as exhibits to its Direct Case, the following information requested by the Commission in the *Designation Order*:

- A. “We direct ACS to submit . . . a recalculated interstate revenue requirement for the period July 1, 2000 to June 30, 2001 that complies with the Commission’s decision in *GCI v. ACS Holdings*, the separations rules and orders cited therein, and the requirements of the *Separations Freeze Order*.”**

ACS has provided recalculated Part 36 data, which treats ISP traffic as intrastate and counts intraoffice calls as two DEMs, at ATTACHMENT A. Recalculated Part 69 data, which treats ISP traffic as intrastate and counts intraoffice calls as two DEMs, are also provided at ATTACHMENT B.

- B. “ACS must provide for calendar year 2000: (1) total DEM minutes; (2) interstate DEM minutes (excluding ISP minutes); (3) intrastate DEM minutes (including ISP minutes); and (4) ISP minutes.”**

ACS has provided the requested figures at ATTACHMENT C. These figures summarize minute count data collected by ACS’s local exchange switches.

- C. “ACS must recalculate and submit with its direct case revised revenue requirements for each access category and the interexchange category.”**

The requested information is provided in ATTACHMENT D.

- D. “We also direct ACS to submit any studies of the allocation of costs, expenses, and revenues between the state and federal jurisdictions that it submitted to the Regulatory Commission of Alaska in case U-01-82, Intrastate Access Charge Revenue Requirement, Cost of Service, and Rate Design Study.”**

The requested information is provided in ATTACHMENT E.

Order and the filing of the January 2002 Tariff. In compliance with the *GCI Order*, therefore, ACS has, under protest, filed its monitoring reports for the 1999-2000 monitoring period using the methodology specified in the *GCI Order*.

The *Jurisdictional Separations Freeze Order* appears to have no bearing on the issue of whether it was proper for ACS to use the cost study underlying its July 2000 Tariff in preparing its January 2002 Tariff. That Order simply directs carriers to freeze various allocation factors, including the DEM factor used to separate traffic-sensitive local switching and transport costs, based on calendar year 2000 data. While this freeze took effect on July 1, 2001, ACS did not file an interstate access tariff to take effect in July 2001, and nothing in the *Jurisdictional Separations Freeze Order* required it to do so. Moreover, the *Jurisdictional Separations Freeze Order* did not require any adjustment to any allocation factors used by carriers that did file interstate access tariffs to be effective in July 2001, because calendar year 2000 was the year that serves as the basis for the allocation factor freeze.

Further, nothing in the *Jurisdictional Separations Freeze Order* required ACS to modify its jurisdictional treatment of the traffic-sensitive costs of ISP-bound traffic in its January 2002 Tariff. While the *Jurisdictional Separations Freeze Order* states that, “[t]he Commission has directed carriers to treat the traffic-sensitive local switching costs that ISPs incur through their connections to LEC end-offices as intrastate for separations purposes,”³⁶ the order does not itself contain a directive to that effect, and neither the *Rate-of-Return Access Charge Reform Order* nor the *MAG Tariff Filing Order*, contain any exception to their revenue neutrality and “last annual tariff filing” mandates to accommodate modifications carriers might need to make to comply with such a directive in any event.

³⁶ *Jurisdictional Separations Freeze Order*, at ¶ 39 (emphasis added).

Commission's directives in the *Rate-of-Return Access Charge Reform Order* and the *MAG Tariff Filing Order*.³⁸

2. ACS Has Never Allocated UNE Revenues Differently from UNE Costs

In the *Designation Order*, the Commission directs ACS to indicate how it allocates both the costs and revenues associated with the provision of UNEs.³⁹ Although it ordered network unbundling pursuant to Section 251 of the Act in 1996,⁴⁰ the Commission has never established rules governing the treatment of costs and revenues associated with the provision of UNEs.⁴¹

ACS does not treat revenues from UNE loops differently from their costs.⁴² ACS has always allocated its UNE revenues and costs in consultation with NECA, and has always used methodologies recommended by NECA. In the cost study supporting its July 2000 Tariff, ACS did not subject either the costs or the revenues associated with UNE loops to separations at all, instead removed these costs and revenues prior to performing jurisdictional separations under Part 36 of the Commission's rules. In its 2000 and 2001 NECA cost studies, ACS allocated the costs of UNE loops and related revenue to the intrastate jurisdiction. Beginning with the rate case now pending before the Regulatory Commission of Alaska ("RCA"), ACS now directly assigns

³⁸ See *Rate-of-Return Access Charge Reform Order*, at ¶ 12 (noting that "the rate structure modifications we adopt do not affect overall recovery of interstate access costs"); *MAG Tariff Filing Order*, at ¶ 3 ("This tariff filing should be revenue neutral").

³⁹ *Designation Order*, at ¶ 12.

⁴⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted).

⁴¹ *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd 22120 (1997), at ¶¶ 88-92.

⁴² The loops is the only UNE ACS provides in Anchorage.

Under section 69.3 of the Commission's rules, ACS's next access tariff filing is due to be filed to take effect for the two-year period beginning July 1, 2002. ACS fully expects at that time to file rates in accordance with the directives of the *GCI Order*, the opinion of the D.C. Circuit in ACS's appeal of that order, the *Jurisdictional Separations Freeze Order*, and the *Rate-of-Return Access Charge Reform Order*.³⁷ But, whatever impact these decisions have on other tariff filings, they have no bearing on January 2002 Tariff because they cannot render the Commission's instructions in the *MAG Tariff Filing Order* less clear. That order required ACS to submit a revenue neutral tariff by using "the demand data used in the last annual tariff filing made by" ACS, *i.e.*, the July 2000 Tariff. Accordingly, ACS used the proper baseline revenue requirement in its January 2002 Tariff.

Further, NECA's practice of updating its common line tariff annually cannot override this clear Commission mandate as it applies to ACS and cannot be read to require ACS to develop a new cost study that would have been used for a hypothetical ACS tariff filing to take effect in July, 2001. The *MAG Tariff Filing Order* contained no exception to the "last annual tariff filing" language for carriers that file interstate traffic-sensitive access tariffs every two years, but that participate in the NECA common line tariff that is updated annually. Especially for ACS, the revenue effect of a new cost study computed based on the requirements of the *GCI Order* and the *Jurisdictional Separations Freeze Order* would have been dramatic, far more so than the variations created by the mismatch that results from NECA's use of the demand data from its most recent annual tariff filing, that made to take effect July 1, 2001, to prepare its January 2002 tariff. Therefore, of the two possible courses, the one pursued by ACS created the more revenue-neutral tariff filing which, therefore, complied more closely with the

³⁷ See 47 C.F.R. § 69.3.